SUPREME COURT, U. S.

No. 1224

APR 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

In the Matter of: THE WINGREEN COMPANY, ET AL,

J. H. BROCK, as Trustee for THE WINGREEN COMPANY, a Florida corporation; THE DANIA CORPORATION, a Florida corporation; and THE LAKE WORTH COMPANY, a Florida corporation,

Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, J. H. BROCK, as Trustee for The Wingreen Company, a Florida corporation; The Dania Corporation, a Florida corporation; and The Lake Worth Company, a Florida corporation, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case.

In accordance with Rule 23(5) Rules of the Supreme Court of the United States [Adopted June 12, 1967 effective October 2, 1967 28 U.S.C.A. Rules of the Supreme Court, Rule 23, p. 39], your Petitioner seeks a writ of certiorari addressed to two decisions and judgments entered by the United States Court of Appeals for the Fifth Circuit. The judgments were entered in the same cause of action, but involved two different rulings of the trial court, however, the appellate decisions disposed of identical questions. Your Petitioner thus deems it sufficient to file a single petition for writ of certiorari addressed to all of the decisions and opinions of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the District Court of the Southern District of Florida dated January 30, 1967 is not report, but is reproduced at Appendix K, App. p. 31 (R. 1218).

The Opinion of the District Court of the Southern District of Florida dated February 19, 1968 is not reported but is reproduced at Appendix L, App. p. 39.

The Opinion of the District Court of the Southern District of Florida dated August 6, 1968 is not reported but is reproduced at Appendix M, App. p. 49 (R. Vol. V1, 404).

The Opinions of the Court of Appeals for the Fifth Circuit dated December 5, 1968 is reported at 405 Fed.2d 429 and 405 Fed.2d 435 and for the Court's convenience are reproduced at Appendix A and B, App. pp. 2 and 13 (R. 1256-1259).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 5, 1968 and copies thereof are appended to this petition in Appendixes N and O, App. pp. 63 and 65 (R. 1270-1).

On January 6, 1969, the Court of Appeals for the Fifth Circuit denied the petitions for rehearings, copies of said Orders are appended to this petition as Appendixes P and Q, App. pp. 67 and 69 (R. 1305-6).

No stay of mandate had been sought either in the United States Court of Appeals for the Fifth Circuit or in this Honorable Court.

The petition is timely filed. [Title 28 U.S.C.A. Sec. 2101(f)]; 62 Stat. 961; and 63 Stat. 104.

The jurisdiction of this Court is invoked under Title 11 U.S.C.A. Sec. 47(c); [30 Stat. 553 as amended]; and Title 28 U.S.C.A. 1254(1); [62 Stat. 928].

QUESTIONS PRESENTED

1. Can a United States Court of Appeals, notwithstanding the provisions of the Bankruptcy Act, direct that an appeal from an interim award of fees for a reorganization trustee and his attorney be presented, other than on the original record, and other than summarily?

2. Though it is admitted that the right to be heard granted to a creditor in proceedings in Reorganization contains the right to appeal, however, does such right to appeal exist when the order or decree sought to be appealed does not materially, substantially and adversely affect the appellant?

3. This Honorable Court, in the exercise of its supervisory jurisdiction, is called upon to decide questions of a substantial nature which have not been heretofore settled by this Court:

a) Where an appellant seeks to review an interim award of fees to a reorganization trustee and his attorney, are the proceedings governed by the provisions of the Bankruptcy Act or are they governed by the statutes dealing with interlocutory appeals?

b) Where an Opinion of the United States Court of Appeals contains obvious omission and error, not supported by the record, can this Honorable Court correct the same so that the Opinion is in conformity with the record?

c) Where a trial court did not abuse its discretion, commit clearly erroneous error, make any mistake in the application of ruling law, can a United States Court of Appeals, in its effort to retry the cause, contrary to its jurisdiction, insert a "legal standard" as a justification of its application of extra-judicial jurisdiction?

STATUTES INVOLVED

1. Section 24 of the Bankruptcy Act, [Title 11 U.S.C.A. §47].

> "24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.
>
> b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.
>
> c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and order of the United States court of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

2. Section 206 of the Bankruptcy Act, [Title 11 U.S.C.A. §606].

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

3. Section 250 of the Bankruptcy Act, [Title 11 U.S.C.A. §650].

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the court of appeals independently of other appeals in the proceedings, and shall be summarily heard upon the original papers."

4. Title 28 U.S.C.A. 1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

5. Title 28 U.S.C.A. Sec. 1292.

(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district court or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting."

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section shall be of the opinion that

such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT OF THE CASE

It is respectfully brought to this Court's attention that the instant Petition for Certiorari deals with three interim awards of fees for the Trustee and his attorney in reorganization and, hence the statement of the case, while lengthy, attempts to present the proceedings conducted and disposed of by both lower courts.

On January 25, 1966 the three debtor corporations, The Wingreen Company, The Dania Corporation, and The Lake Worth Company, all controlled by the same individuals, and being interrelated as to indebtednesses, filed three individual voluntary petitions seeking to have their affairs reorganized in accordance with Chapter X provisions of the Bankruptcy Act. The petitions were filed in the United States District Court of the Southern District of Florida. (R. 1, 11 and 27).

The three estates were consolidated for administrative purposes because of their interrelationship and general management. A Consolidation Order and a Restraining Order were entered on January 25, 1966. One of the provisions of the Orders set a time and place for hearings as to whether or not the petitions had been filed in good faith. (R. 37).

The Wingreen Company was a real estate holding company and its business consisted of acquiring, either through direct ownership or through leasehold interests, real estate and developing the same by improving the parcels with apartment houses, office buildings, motels, etc. It did business in a wide spread area in Florida, having holdings in Alachua, Brevard, Dade and Escambia Counties. The assets of The Wingreen Company in accordance with statements issued by the company and as best as the same could be verified by the Trustee could be evaluated at $9,280,500.00, and the liabilities as established by the Trustee were $10,327,141.64[1]

The Lake Worth Company was a holding company which controlled 45,050[2] shares of the capital stock of the First National Bank in Lake Worth. These stockholdings were pledged to repay an encumbrance of $2,911,430.08. The encumbrance was created at the time of the acquisition of the holdings and far exceeded the stock's value, either in the open market or book value. (R. 174 and 301).

[1]The books and records of all three Debtors were not current. In some instances they had not been posted for six months to one year. The Trustee arrived at the foregoing evaluations after reconstructing the books and records of the Debtors. See Report filed by the Receiver and the Trustee under Section 167(1) of the Bankruptcy Act—11 U.S.C.A. § 567(1) (R. 174 and 301).

[2]Representing in excess of sixty-four (64) percent of the authorized outstanding and issued capital stock.

The Dania Corporation was a holding company controlling 174,893[3] shares of the common stock issued by the Dania Bank, Dania, Florida, a state bank. These stockholdings were collateralized to repay an encumbrance of $5,631,288.17. As in the Lake Worth instance this indebtedness was created at the time of the acquisition of the stockholding. (R. 174 and 301).

Inasmuch as all of the stock held by The Dania Corporation in the Dania bank, and all of the stock held by The Lake Worth Company in the First National Bank in Lake Worth were collateralized and the indebtedness for which they were pledged were daily accruing interest charges it was apparent that the burdensome aspects of the bank stocks would have to be removed before The Wingreen Company could be rehabilitated. No reference is made to the management of both banks, but it can be stated, and the record reflects, that both banks had more than their share of bad loans.

The combined and consolidated assets were evaluated at $17,931,973.89, and the liabilities at $19,984,148.13. [Trustee's Report filed in accordance with Court's Order under Section 167(1) of the Bankruptcy Act—11 U.S.C.A. § 567(1)](R. 721).

There were in excess of nine hundred creditors, fifty of which claimed a secured status by virtue of agreements, chattel mortgages, real estate mortgages, chattel leases, retain titles, mechanics' liens and other statutory liens.

[3]Representing in excess of eighty (80) percent of the authorized, outstanding and issued capital stock.

Various and sundry creditors had filed Petitions to vacate the Orders of consolidation and to dismiss the respective Petitions, alleging failure of good faith. (R. 38 and 44).

Hearings were held on the motions addressed to the vacating of the Orders of consolidation and upon the issue of good faith as required by the statutes.

Finally, on May 23, 1966, the court entered its Order replete with minute findings of fact and conclusions of law approving the respective Petitions of the various Debtors for reorganization under Chapter X of the Bankruptcy Act. (R. 489). The court denied the motions to vacate the Order of Consolidation, found good faith, and appointed a Trustee and an attorney for the Trustee. (R. 419).

Upon his appointment the Trustee took an active daily part in the running of two motels, an office building, four apartment buildings, a warehouse building, vacant real estate, and was required to give his attention to the operation of two banks and keep the court advised accordingly.

The Trustee was eminently qualified. He is a retired vice president of Eastern Airlines and had considerable experience in financial and banking matters, which experience included serving as a bank director.

The Wingreen Company was indebted to both banks which were controlled by The Dania Corporation and The Lake Worth Company. On the other hand, the bank holding companies were both indebted to Wingreen when the latter advanced sums to the former so that the controlling stock interests in the banks could be purchased.

Among other difficulties The Wingreen Company, shortly prior to the filing of the original Petitions, completed the construction of a motel-restaurant complex in Gainesville, Florida by the utilization of temporary construction financing. It appears that the permanent financing could not be arranged and a number of mechanics' lien creditors filed their liens of record. Thus, the Trustee was required to preserve assets, operate businesses, supervise banks, and create order out of economic chaos.

Simultaneously, he was required to safeguard and manage properties so that their economic values would not be deterred or lessened, and lastly, he was required to reconstruct the financial records of the Debtors.

The Appellant is a first mortgagee holding a real estate mortgage on The Wingreen Company property in Cocoa Beach, Brevard County, Florida. This property is improved by a 173 room motel, a restaurant, a cocktail lounge, and a 16 unit apartment building. At the commencement of the proceedings the unpaid balance due and owing to the Appellant as reflected by the records of the Debtor and verified by the Appellant (J. H. Brock, as Receiver, had circularized all secured creditors requesting that they verify unpaid balances due and owing to them by The Wingreen Company) was established as $933,461.39 as to principal.

The secured indebtedness involving the stock held by The Dania Corporation was accruing interest at a daily rate, and had, in fact, accrued some $332,680.00 of

interest to the date of the sale of the stock. Thus, at the time the stock was sold the combined indebtedness as to principal and interest was $5,631,288.17. The principal indebtedness was owed to the Florida National Bank of Jacksonville, the Citizens National Bank of Orlando, the American National Bank of Jacksonville, the Inter National Bank of Miami, the United Securities Insurance Company, and Lexington Financial Corporation (Garvice D. Kincaid).

Based upon the financial statements of the Dania Bank and the examiners' reports it appeared that the 174,893 shares of the Dania Bank stock held by The Dania Corporation were evaluated far below the principal indebtedness for which said stock was pledged, to-wit: $5,298,608.17. The Trustee had managed, through court proceedings, to collect the dividends declared by the Dania Bank on all of the shares of stock registered in the name of The Dania Corporation.

Kincaid lodged two specific appeals, one was addressed to the refusal of the court to vacate the Order of Consolidation, and the other involved the finding of good faith.

The Trustee, after strenuous negotiations, convinced Kincaid to waive his rights to the dividends which Kincaid alleged were pledged to him, and to further pay to the Trustee $75,000.00 in cash for the Trustee's right, title and interest, whatever it may have been as Trustee of The Dania Corporation in and to 124,560 shares of the Dania Bank stock, or a total of $106,140.00. Kincaid further agreed to dismiss both appeals.

At the conclusion of the transaction, which was eventually approved by the court, the Trustee had available in excess of $100,000.00[4] as operating capital to safeguard and preserve the assets of The Wingreen Company, and unburdened the consolidated proceedings of an indebtedness in excess of $5,600,000.00[5].

A conclusion to be drawn from the record reflects that the Trustee through his efforts achieved a selling price far in excess of the value of the stock, and obtained cash receipts, which allowed the Trustee, by virtue of subsequent court orders, to preserve, safeguard and operate The Wingreen Company properties without subjecting said properties to any additional liens to secure certificates of indebtednesses. (Because of the status of the secured obligations of The Wingreen Company, if it were necessary to issue certificates of indebtedness these certificates would have been administrative charges of a first dignity).

The liquidation of the First National Bank in Lake Worth stock involved 45,050 shares. The book value of this particular asset, as reflected by capital, surplus and undivided profit on June 30, 1966, was evaluated at $35.74 a share. The Trustee effected a sale which netted the

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[4]At that time the Dania Bank was being pressured to increase its capital contribution and surplus; the sources for these increases to be contributions from stockholders.

[5]At the completion of the complete liquidation of the 174,893 shares of Dania Bank stock the Trustee realized the sum of $118,723.24. It can be said without reservation that if the Dania Bank stock held by The Dania Corporation was liquidated in an open market there would have been no cash consideration realized by the Trustee in excess of the liens. The possibility existed that the total indebtedness secured by liens would not have been discharged.

estate $65.07 a share. While the Trustee only received $20,000.00 in cash, the estate was relieved of a secured principal indebtedness of $2,911,430.08. In addition thereto, the two appeals lodged by the Citizens National Bank of Orlando were dismissed, and a $500,000.00 claim was withdrawn as part of the consideration. The $20,000.00 was made available to the Trustee for purposes which are outlined hereinbefore in regard to the Dania Bank stock sale proceeds.

As a result of both sales the Trustee had available $138,723.24 for internal utilization.

In addition to the foregoing the Trustee recovered $22,393.84 which represented a security deposit held by the American Fire and Casualty Company. The Trustee further liquidated stockholdings of the Debtor in Crowder and Associates, Inc., an insurance agency, for the sum of $10,050.00 (the Crowder stock was actually issued to an officer of The Wingreen Company but the Trustee successfully established the stock as the property of The Wingreen Company and retained the proceeds of the sale).

The following is an enumeration of additional cash receipts handled by the Trustee for the periods involved.

May 24, 1966 - December 31, 1966, Income from operation of businesses under the Trustee's jurisdiction excluding dividends received Dania Bank stock	$1,674,755.98

Dividend Dania Bank stock — plus interest accrued thereto as of December 31, 1966	44,415.52[6]
January 1, 1967 - December 31, 1967 Income from operation of businesses under the Trustee's jurisdiction	2,613,028.81
January 1, 1968 - June 30, 1968 — Income from operation of the businesses under the Trustee's jurisdiction	843,662.42
February 29, 1968, proceeds of sale Ramada Inn, Gainesville, Florida	300,000.00
Proceeds of sale Biscayne Shores Apartments, furniture Cocoa Beach Apartments, Coral Gables property	49,003.00
Total	$4,524,865.73

It is further respectfully called to this Honorable Court's attention that the Trustee, at the time the last Petition for Interim Fees was considered by the trial court and dealt with by the opinions of the United States Court of Appeals for the Fifth Circuit, had further realized $191,000.00 as a result of action undertaken to recover voidable preferences.

[6]The sum of $138,723.24 includes the dividend paid by the Dania Bank on its stock in the amount of $44,415.52. The figure is not intended to be a duplicate computation.

The record was detailed and lengthy, but the United States Court of Appeals for the Fifth Circuit saw fit to require a printed appendix rather than to summarily decide the issue on the original record, and on two occasions granted Orders to diminish the record. (App. pp. 15 and 20) and on one occasion denied a motion to dismiss the appeal (App. p. 15). Not only did the Court direct that the record itself be diminished, it directed that the joint appendix be curtailed also. (App. p. 21).

The Fifth Circuit not being content with two diminutions of the record, proceeded on June 25, 1968 to again diminish the record (App. p. 23). Thus, in a proceeding that should have been summarily determined upon its original record, the United States Court of Appeals systematically depleted the record, and it was not in any position to fairly, adequately or correctly give weight to the services performed by the Trustee and his counsel. By the verbiage in the opinion itself, which establishes an hourly rate to be paid to the Trustee and his attorney, we find a clear usurpation of the trial courts' function.

Thus, the Fifth Circuit did, in effect, after diminishing the records, try the matter on an abbreviated record and did make and enter findings of fact and the establishment of fee, contrary to its jurisdiction.

Because of the systematic diminution of the record in Cause No. 25,303, your petitioner was required to prepare an appendix to his brief, in Cause No. 26,479 in an effort and an attempt to present portions of the record, which the court should have had summarily before it, however, by its previously entered orders these essential

portions of the record were lacking (App. p. 23). Thus, we find a record aborted systematically and an appellee who is required, in order to attempt to preserve the record, to appendix his brief, (R. Vol. VI, 1253). This in spite of the dictate of the Bankruptcy Act that the proceedings be summarily determined on the original record.

On two separate occasions the matter was argued before the United States Court of Appeals for the Fifth Circuit (R. 1254, 1255). The panel of the court presiding over the second argument ruled that it would act in harmony with the panel disposing of the matter as originally argued, and, therefore, of necessity, would enter its opinion and order giving due consideration to the conclusions reached by the panel disposing of the first appeal. Thus the petitioners were not afforded a complete evaluation of the value of the total services performed, neither of the two panels being fully cognizant of the overall picture which included many developments and services which were not made available to the court because of the diminution of the record.

Both of the Opinions rendered overlook and fail to cope with the amounts of the recoveries, the amount of cash handled, the amount of the assets, the uniqueness of the problems, the services performed and the achievements realized. The decisions only enumerate (erroneously) the hours expended and the sums received therefore, thus effectuating a discriminatory condition by enunciating a doctrine of payment for hours expended whether the same be mediocre or memorable.

REASONS FOR GRANTING THE WRIT

The provisions of the Bankruptcy Act dealing with appeals from orders refusing to make allowances of compensation or reinbursement in reorganization proceedings are clear, unambiguous and contain a Congressional dictate as to the mode in which they are to be conducted. The mandate requires that such proceedings shall be summarily heard upon the original papers [Section 250 of the Bankruptcy Act; 11 U.S.C.A. §650] and this Honorable Court has never had before it the exact and identical situation as to whether or not a United States Circuit Court of Appeals can, in face of these enactments, require the parties to substitute for the original papers a joint appendix and whether, by the exercise of its jurisdiction, require the parties to limit the contents of the joint appendix thereby circumventing the requirements of the statutes that such matters should be summarily heard upon the original papers. [*See Order of March 24, 1969—United States Court of Appeals Fifth Circuit taxing costs of printing joint-appendix, etc.*]

Thus this Honorable Court is called upon to interpret a Congressional statute never before decided by this Court involving the disposing of a material and vital procedural question. A question which should be disposed of to facilitate a uniformity in the application of the provisions of the Bankruptcy Act involving all of the United States Courts of Appeals.

The next element to create sufficient interest in granting the writ of certiorari appears to be a question involving an extension of the right to be heard on all matters in a proceeding under the reorganization pro-

visions of the Bankruptcy Act [Section 206 of the Bankruptcy Act; 11 U.S.C.A. §606]. It is conceded that the right to be heard, provided for by this particular section of the Bankruptcy Act, carries with it the right to lodge an appeal,[7] however; does this right extend to a party not materially and adversely affected by a judgment.

Does this particular subdivision of the Bankruptcy Act create a classification of appellate litigation which can be maintained by parties not adversely and materially affected by the ruling, thus creating a conflict within the basic realm of the Federal Statutes [28 U.S.C.A. §§ 1291 and 1292].

The Opinions themselves stand in direct contravention, not only with previous decisions in the United States Court of Appeals for the Fifth Circuit, but in conflict with the rule of law established in the United States Court of Appeals for the Second Circuit, the Seventh Circuit and the Ninth Circuit [**Ritchie Inc., v. Cheseborough-Ponds Inc.**, 2nd Cir. 1960, 281 Fed.2d 755; **In re, Michigan-Ohio Building Corp.**, 7th Cir. 1941, 117 Fed.2d 191; **Manda v. Sinclair** 5th Cir. 1960, 278 Fed.2d 629; **Mayer v. National Missile & Electronics**, 9th Cir. 1964, 326 Fed. 2d 401; in accord and approved Collier on Bankruptcy, 14th Ed., Vol. 6A p. 312].

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[7]The obeservation of the United States Court of Appeals for the Fifth Circuit "The Trustee also urges that this court is without jurisdiction for the reason that Massachusetts Mutual Life Insurance Co. failed to obtain leave to appeal prior to the expiration of the time allowed within which to seek permission from the Circuit Court to Appeal." *Massachusetts Mutual Life Insurance Co. v. Brock, supra* at 431 and the conclusions reached are now moot in view of the Federal Rules of Appellate Procedure for the United States Courts of Appeals adopted December 4, 1967 and effective June 1, 1968. *See* Title 28 U.S.C.A. Rules-Federal Rules of Appellate Procedure-Rule 6, pg. 72.

This legal concept i.e., one may not appeal unless he has an interest which is direct, immediate and substantial and not a mere possible remote or unforeseen consequence is recognized by the Opinions[8]. The Opinions, therefore, recognize a deficiency in the application of its own theory which is in conflict with established legal principals, thus weakening the position of the application of the jurisdiction of the United States Court of Appeals for the Fifth Circuit in the matter.

Basically this Honorable Court is called upon to exercise its supervisory jurisdiction in an effort to aid the various and sundry United States Courts of Appeals to establish a uniformity of approach to several interrelated matters, i.e., does a Court of Appeals have jurisdiction to review an interim award of fees in reorganization procedures and if so, do the provisions of the Bankruptcy Act, or do the provisions of the Interlocutory Appeals Act, govern?[9]

Does this Court's supervisory jurisdiction permit it to correct an obvious error in an Opinion of a Court of Appeals so that the Opinion as corrected will conform to the record of the cause; and finally, can a United States Court of Appeals interject a "legal standard" as a justification for the exercise of its extra-judicial jurisdiction to enable it to try a matter, de novo, and in effect, substitute its findings of fact and conclusions of law for that of a trial court which did not commit clearly erroneous error, any mistake of law nor abuse its discretion.

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[8]". . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of the Wingreen Company, and its interest lies in the fact that the fees in question *may* result in the assessment of administrative costs against that property" (emphasis ours) *Massachusetts Mutual Life Insurance Co. v. Brock, supra* at 431.

[9]U.S.C.A. §650 as coupled with 28 U.S.C.A. 1291, and 1292.

The foregoing constitute severe questions, which if resolved by this Honorable Court, would go a long way towards creating a uniformity of approach amongst the various Circuit Courts of Appeals of the United States.

While Section 250 of the Bankruptcy Act [11 U.S.C.A. §650] does not mention interim awards of fees in reorganization proceedings and only makes reference to " . . . order making or refusing to make allowances of compensation or reimbursement, and may, . . . , be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, . . . "; must this particular language be read in harmony with the provisions of 28 U.S.C.A. §1291.[10]

The undersigned has not been able to find any cases which deal with this demarcation of jurisdiction other than the intimation by the United States Court of Appeals for the Third Circuit which indicated that appeals are to be dismissed because they are premature when they are lodged against interlocutory non-appealable[11] orders [**In re: Chotiner** 3rd Cir. 1914 218 Fed. 813.

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[10]"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[11]The Petitioner filed a Motion to Dismiss for lack of jurisdiction, and Motion to summarily determine the Appeal before the United States Court of Appeals for the Fifth Circuit. These motions were contained in the briefs submitted by the Petitioner-Appellee, pp. 1-6, Appellee's brief, United States Court of Appeals for the Fifth Circuit in Cause No. 25,303. This position was preserved in Cause No. 26,479 and 26,711. See Appellee's brief filed in Cause No. 26,479 and Order consolidating causes 26,479 and 26,711.

A reading of the Opinion[12] reveals that omitted therefrom are the tabulations of hours expended by the Petitioner, Brock, as Receiver, and his attorney, as attorney for the Receiver.

The record is clear that J. H. Brock, as Receiver expended 352.5 hours in this capacity, and the attorney for the Receiver expended 320 hours. Thus the hours expended for the period of time from February 8, 1966 - June 30, 1968 and the total compensation awarded were, in fact, as follows:

	Hours	$ Received	Hourly Rate
BROCK	2,767	109,080.00	$ 39.80
WOLFF	2,714.5	161,500.00	59.40
TOTAL		270,580.00	

This necessitates corrections in the Opinion to wit; the $45.00 hourly rate set forth in line 5, paragraph 2 of page 10 of the Opinion, should be corrected to read $39.80; and the $67.00 figure in line 3 of paragraph 3 on page 10 of the Opinion should be corrected to read $59.40.

Thus the figures in paragraph 2 and 3 on page 10 of the Opinion should be further reduced accordingly to the mathematical computations properly reflecting the true amount. Therefore, the conclusion contained in the Opinion that the fees earned involved a little more than one-half of the time (paragraph 3, page 10 of the Opinion) of both the Trustee and his attorney, should be corrected to eradicate the erroneous impression.

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[12] 405 Fed.2d 429 at 434.

It would appear that this Court, within its broad supervisory capacity, would have the right to correct clear error contained in an Opinion of the United States Court of Appeals where there is a reliance upon an erroneous conclusion which is contrary to and unsupported by the record.

The court, in its Opinion, readily admits that the Reorganization Court did not commit any error in weighing the non-disputed facts. Thus, the facts as found by the trial court must be conceded as correct and true. The Opinion under consideration admits that the lower court did not commit error in the application of any doctrine of law to the non-disputed facts. However, it attempts to create an extraneous concept to support its conclusion that there was an abuse of discretion exercised by the District Court of a new basis by the introduction of a "legal standard", a new concept.

This is contrary to acceptable legal dogma and involves the placing of an unfounded limitation upon a trial court's use of its discretion. That an appellate court has power to review an exercise of judicial discretion is fundamental, however, such inquiry is limited to whether the action of the trial court was arbitrary in its failure to apply appropriate legal doctrines (not standard) to established undisputed facts. [**Young vs. Garrett,** 8th Cir. 1947, 159 Fed.2d 634].

Nowhere in the record can there be a showing of arbitrariness upon the part of the Reorganization Court, and the Opinion does not even intimate that there was. Hence, the application of a "legal standard" concept was baseless and the conclusions and deductions contained in the Opinion are contrary to acceptable legal dogma previously espoused by the courts. Thus, the Opinion con-

tains severe contradictions in the application of the law involved, and when these are compounded with the inadvertent mathematical errors therein contained, we are presented with an abuse of appellate jurisdiction, and instead of the true question, we have interposed a question of degree.

When the correction of the inadvertent mathematical computation contained in the Opinion[13] is made, we find that no problem of abuse of discretion exists, but rather one of degree and an appellate court will not be allowed to exercise an extra jurisdictional function, i.e. to become a trier of fact by the application of such shallow principals.

Degree is factual, and since nothing in the records show a misinterpretation of the facts, the appellate court cannot substitute its opinion as to degree for that of the trial court and dispose of the question as one of an abuse of discretion.

Thus, we find an insertion of a question of degree which is insufficient to permit an appellate tribunal to become a trier of fact.

This approach by the Fifth Circuit creates a difficulty and diversification of opinion amongst the various circuit courts. At least three circuit courts now stand in conflict with the Opinion under consideration.

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[13]The Opinion erroneously establishes $67.40 per hour as the hourly rate earned by the attorney for the trustee. The proper mathematical calculation utilized and the proper number of hours involved indicate an hourly remuneration awarded by the District Court of $59.00. With the proper evaluation, the trustee's hourly rate is computed at $39.40 per hour instead of $45.10. Comparing the true allowances with fees set by the appellate court, we find the trustee was awarded $39.40 per hour by the trial court and $25.00 per hour by the appellate court. We further find that the attorney for the trustee was awarded $59.00 per hour by the trial court and $50.00 per hour by the appellate court. Hence, a question of degree.

The United States Court of Appeals for the Seventh Circuit has held that an appellate court may not try, *de novo*, the issue of reasonable compensation in reorganization proceedings; and the trial court's judgment will not be disturbed unless it clearly appears that there is no basis, in evidence, for the conclusion reached, or that the court proceeded on erroneous conceptions of the law [**In re; 32-36 North State Street Building Corp.**, 7th Cir. 1947, 164 Fed.2d 205].

The Eighth Circuit Court of Appeals held that where a circuit court of appeals reviews a fee award within the broad discretion of the bankruptcy court it does not attempt, nor will it try *de novo*, the issue of reasonable compensation [**Stein v. Hemker** 8th Cir. 1946, 157 Fed.2d 740].

The Ninth Circuit Court of Appeals ruled that where a district court possesses intimate knowledge of the day to day administration of an estate and has a familiarity of the course of the proceedings, it is inherent that such knowledge is particularly important to an accurate appraisal of services rendered; and where the findings as to the nature and value of the services are sufficiently specific, and not clearly erroneous, there is no jurisdiction in the appellate court to disturb the award. [**In re; West Coast Investors, Inc., Debtor**, 9th Cir. 1968, 388 Fed.2d 622].

The Ninth Circuit Court of Appeals clearly put the Opinion under consideration in direct conflict with its understanding of the law. That particular circuit court held, in a very recent case, that the issue in the review of fees allowed by the trial court is not whether the circuit court would have allowed the same sum as the trial court, or whether the court of appeals might con-

clude that it should have fixed a different fee, possibly larger, but that the basic test was whether or not the findings of fact, upon which the fee was based, were clearly erroneous [**Levitt v. Robinson** 9th Cir. 1968 402 Fed.2d 753; in accord with **Lungreen v. Freeman** 9th Cir. 1962, 307 Fed.2d 104 at 115; **Snider v. England** 9th Cir. 1967, 374 Fed.2d 717 at 720].

CONCLUSION

It appears that this Honorable Court's supervisory jurisdiction is urgently needed to establish, within the concepts of the statutes involved, a uniform procedure by laying down fundamental requisites to be followed uniformly by all the United States Courts of Appeal to effectuate a uniform administration of the Bankruptcy Act in the various circuit courts of appeals.

In addition, it is elementary that the conflicts which have been created amongst the various circuit courts of appeals should be eradicated so as to eliminate a growing chasm in the interpretation and application of the jurisdiction of the United States Courts of Appeals when invoked to review interim awards in reorganization proceedings.

Respectfully submitted,

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